

**BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF
HAMZA BENDERRA/MARRAKECH EXPRESS,
TO ASSESSMENTS ISSUED UNDER
ID NOS. L0336704064**

No. 13-05

DECISION AND ORDER

A formal hearing on the above-referenced protest was held February 7, 2013, before Dee Dee Hoxie, Hearing Officer. The Taxation and Revenue Department (Department) was represented by Mr. Peter Breen, Staff Attorney. Mr. Andrick Tsabetsaye, Auditor, and Mr. Steve Duran, Auditor, also appeared on behalf of the Department. Mr. Hamza Benderra (Taxpayer) appeared for the hearing and was represented by his accountant, Mr. Mark Ihlefeld. The Hearing Officer took notice of all documents in the administrative file. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. The Taxpayer was engaged in business in New Mexico in 2008 and 2009. The Taxpayer was operating a shop that sold pipe tobacco, cigarettes, pipes, and other smoking accessories.
2. The Taxpayer failed to pay the Tobacco Products Tax (TPT) on the pipe tobacco that he purchased from June 2008 through December 2009.
3. The Department learned that the Taxpayer was selling pipe tobacco to other retailers when a merchant provided them with a copy of a handwritten invoice from the Taxpayer to show that the merchant had purchased the tobacco locally. The merchant explained that the Taxpayer would come by in his car and sell tobacco to the local shops. The

merchant also gave the Taxpayer's address and indicated that the Taxpayer had a shop there.

4. The Department began an investigation into the Taxpayer's business. Mr. Duran drove by the Taxpayer's address and saw that there was a shop there. The shop appeared to be a smoke shop and advertised that it sold tobacco.
5. Mr. Duran checked the Department's records on that shop and on the Taxpayer. Mr. Duran confirmed that the Taxpayer was registered under a CRS number with the Department and had not been paying the TPT.
6. The Department issued a letter to the Taxpayer, but mistakenly included information on a different business. The Department re-issued the letter to the Taxpayer with the correct information. The letter basically advised that the Taxpayer had been chosen for audit under the TPT and requested that the Taxpayer get his documents in order.
7. The Department conducted an audit of the Taxpayer. Mr. Duran went to the Taxpayer's business and noticed that there was not any pipe tobacco on the premises. The Taxpayer also appeared to be trying to move out of the shop. There was a moving truck outside, the utilities were not on, and there were boxes inside. There were also pipes, cigarettes, and other items present.
8. The Taxpayer provided one bank statement during the audit, and did not provide any receipts, invoices, or other documents. The Taxpayer denied selling any pipe tobacco.
9. The Department repeatedly requested documentation from the Taxpayer during the audit, and the Taxpayer never provided any further documentation. The Department received some of its letters back as undeliverable and was informed that the Taxpayer was no

longer at that address. The Taxpayer never filed a change of address with the Department.

10. The Department sent a copy of the audit report to the Taxpayer before it was finalized and gave the Taxpayer another opportunity to provide documentation. The Taxpayer failed to do so.
11. On February 1, 2011, the Department assessed the Taxpayer for Tobacco Products Tax, penalty, and interest for the tax periods from June 2008 through December 2009. The assessment was for \$22,150.39 tax, \$4,430.08 penalty, and \$1,506.26 interest.
12. On February 28, 2011, the Taxpayer filed a formal protest letter.
13. On November 20, 2012, the Department filed a Request for Hearing asking that the Taxpayer's protest be scheduled for a formal administrative hearing.

DISCUSSION

The issue to be decided is whether the Taxpayer is liable for the Tobacco Products Tax, penalty, and interest for the tax periods from June 2008 through December 2009.

Burden of Proof.

Assessments by the Department are presumed to be correct. *See* NMSA 1978, § 7-1-17. Tax includes, by definition, the amount of tax principal imposed and, unless the context otherwise requires, "the amount of any interest or civil penalty relating thereto." NMSA 1978, § 7-1-3. *See also, El Centro Villa Nursing Center v. Taxation and Revenue Department*, 108 N.M. 795, 779 P.2d 982 (Ct. App. 1989). Therefore, the assessment issued to the Taxpayer is presumed to be correct, and it is the Taxpayer's burden to present evidence and legal argument to show that he is not liable for the tax and is entitled to an abatement of penalty and interest.

Tobacco Products Tax.

Purchases of tobacco products in New Mexico are subject to a 25% excise tax, which must be paid by the first purchaser of such products. *See* NMSA 1978, § 7-12A-3. Tobacco products are considered to be “any product, other than cigarettes, made from or containing tobacco.” NMSA 1978, § 7-12A-2 (G). A first purchaser is anyone who is engaged in business in New Mexico, who purchases tobacco from anyone outside of the state and distributes that tobacco in his business. *See* NMSA 1978, § 7-12A-2 (D). Sellers of tobacco products are also required to maintain records that indicate where and from whom they purchased their tobacco products. *See* NMSA 1978, § 7-12A-8.

The Taxpayer initially denied that he was subject to the TPT. The Taxpayer maintained throughout the audit process that he did not sell tobacco products. The Taxpayer even indicated in his protest that he did not sell tobacco products. However, at the hearing, the Taxpayer finally admitted that he did sell tobacco products and that he was the first purchaser of those products. The Department also had reasonable grounds to believe that the Taxpayer was selling tobacco products based upon its investigation during the audit. Therefore, the Taxpayer was subject to the TPT when he purchased tobacco to sell in his shop.

Computation of Tax.

The Taxpayer argued that he only purchased tobacco products during two of the months involved in the audit. At the hearing, the Taxpayer provided copies of three invoices from a smoke shop in California for two tobacco purchases in August 2008 and one purchase in September 2008. These purchases totaled \$6,424.00. The Taxpayer claimed that these purchases account for his total tobacco products purchases from June 2008 through December 2009. The Taxpayer argued that his liability under the TPT is, therefore, \$1,606.00.

The Department argued that the Taxpayer's production of these invoices occurred too late. The Department pointed out that it is a tobacco seller's responsibility to keep accurate records and to provide them to the Department when requested. *See* NMSA 1978, § 7-12A-8. *See also* NMSA 1978, §§ 7-1-10 and 7-1-11. The Department also pointed out that the Department is allowed to use any reasonable method of estimating tax liability when a taxpayer fails to keep sufficient records. *See* NMSA 1978, § 7-1-11 (D). It is a reasonable method when the Department uses information from similarly situated taxpayers to estimate a taxpayer's liability. *See id.* The Department estimated the Taxpayer's liability by using average tobacco purchases of regional tobacco retailers of a similar size. The average amount of tobacco products purchased was calculated to be \$4,663.22 per month.

The Taxpayer argued that the average used to estimate his tax liability was unfair. The Taxpayer argued that his total tobacco sales for the period from January through December 2009 were only \$1,200.16. The Taxpayer denied being in business prior to January 2009. The Taxpayer argued that it would not make sense or be feasible for him to purchase more than \$4,000 per month in tobacco products since he only sold \$1,200.16 worth of tobacco products from January through December 2009.

The Department argued that the Taxpayer could not actually show what his sales or purchase amounts were for the entire audit period. The Department argued that using bank statements to reconstruct sales and purchases based on deposits and withdrawals was not appropriate since the Taxpayer was running his business primarily using cash and had demonstrated an intent to evade taxation. The Department argued that after receiving the letter advising him of the upcoming audit, the Taxpayer removed the merchandise in question and attempted to pack up and leave his shop very hastily. The Department also argued that the

Taxpayer had repeatedly denied selling, and consequently purchasing, tobacco products during the audit process and upon initiating his protest.

Mr. Duran explained the method used to estimate the Taxpayer's liability. Mr. Duran articulated that a shop of a similar size in a neighborhood that had other businesses similar to other businesses in the Taxpayer's shop's neighborhood, selling similar products, and with a similar building was used as the basis for estimating the Taxpayer's liability. The example shop was also audited and their tobacco products purchases for two years were averaged. Mr. Duran also explained that based upon his training and experience, that the estimate used was probably a modest amount. Mr. Duran explained that most tobacco shops of a similar size actually have greater sales and purchases than the one used as the estimate example. Mr. Duran also explained that the audit period was determined by the business start date that the Taxpayer had filed with the Department when he got his CRS number.

In light of the suspicious activities in which the Taxpayer engaged after receiving notice of an impending audit and in light of his repeated and ultimately false denials regarding his sales and purchases of tobacco products, I do not find the Taxpayer's evidence to be credible. I also found the testimony of Mr. Duran to be very credible. Based upon the totality of the evidence, the Taxpayer has failed to overcome the presumption of correctness. Moreover, the evidence provided by Mr. Duran is sufficient to show that the method used to estimate the Taxpayer's liability was reasonable.

Assessment of Penalty.

The Taxpayer argued that his failure to pay the TPT was not willful and was based upon his own lack of knowledge and understanding. A taxpayer's lack of knowledge or erroneous belief that the taxpayer did not owe tax is considered to be negligence for purposes of assessment

of penalty. *See Tiffany Const. Co., Inc. v. Bureau of Revenue*, 90 N.M. 16, 558 P.2d 1155 (Ct. App. 1976). Therefore, the penalty was properly assessed.

Assessment of Interest.

Interest “shall be paid” on taxes that are not paid on or before the date on which the tax is due. NMSA 1978, § 7-1-67 (A). The word “shall” indicates that the assessment of interest is mandatory, not discretionary. *See State v. Lujan*, 90 N.M. 103, 105, 560 P.2d 167, 169 (1977). As the tax was not paid when it was due, assessment of interest was appropriate.

CONCLUSIONS OF LAW

1. Taxpayer filed a timely written protest to the Notice of Assessment of Tobacco Products Tax from June 2008 through December 2009 under respective Letter ID number L0336704064, and jurisdiction lies over the parties and the subject matter of this protest.
2. The Taxpayer was properly assessed for Tobacco Products Tax, penalty, and interest.
3. The method used to estimate the Taxpayer’s liability was reasonable.
4. The Taxpayer failed to overcome the presumption of correctness.

For the foregoing reasons, the Taxpayer's protest **is DENIED**.

DATED: March 4, 2013.

DEE DEE HOXIE
Hearing Officer
Taxation & Revenue Department
Post Office Box 630
Santa Fe, NM 87504-0630

NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, § 7-1-25, the parties have the right to appeal this decision by filing a notice of appeal with the New Mexico Court of Appeals within 30 days of the date shown above. See Rule 12-601 NMRA. If an appeal is not filed within 30 days, this Decision and Order will become final. A copy of the Notice of Appeal should be mailed to John Griego, P. O. Box 630, Santa Fe, New Mexico 87504-0630. Mr. Griego may be contacted at 505-827-0466.

CERTIFICATE OF SERVICE

I hereby certify that I mailed the foregoing Order to the parties listed below this _____ day of _____, 20__ in the following manner:

*First Class Mail and
Certified Mail #* _____

Interoffice Mail

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